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No. 80-1345

In the Supreme Court of the United States

OCTOBER TERM, 1980

KAISER STEEL CORPORATION,
PETITIONER,

v.

JULIUS MULLINS, ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[redacted] BRIEF *AMICUS CURIAE* OF THE TRUSTEES OF BOSTON UNIVERSITY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION OF THE TRUSTEES OF BOSTON UNIVERSITY TO FILE BRIEF *AMICIUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Trustees of Boston University ("Boston University" or "the University") respectfully move for leave to file the attached brief *amicus curiae* in this case. Counsel for both petitioner and respondents have consented to the filing of this brief to the extent it may be allowed under Supreme Court Rule 36(1), and letters evidencing such consent are being filed with the Clerk of the Court.

Amicus recognizes that its brief would be filed outside the time normally allowed by Rule 36(1), but it is only recently that circumstances have given the University reason to support the petition for writ of certiorari in this case. The petition seeks review of the decision of the Court of Appeals for the District of Columbia Circuit in *Mullins* v. *Kaiser Steel Corporation*, No. 79-1463 (D.C. Cir. Sept. 17, 1980). On March 24, 1981, the *Mullins* case was relied on by the United States District Court for the District of Massachusetts in litigation involving the University, when that court issued orders against the University compelling it to take certain actions, while refusing to consider the University's assertions that the actions being compelled would force the University to violate federal law. *Trustees of Boston University* v. *District 65, UAW*, Civil Action No. 81-198-Z (D. Mass. March 24, 1981); *District 65, UAW* v. *Trustees of Boston University*, Civil Action No. 81-329-Z (D. Mass. March 24, 1981).

The University as *amicus* would seek to call the attention of this Court to the fact that the significance of the *Mullins* case was very recently evidenced by its application in this litigation involving the University. The *Mullins* case was explicitly relied on to preclude the University from raising defenses under the Employee Retirement Income Security Act, 29 U.S.C. §§1001 *et seq.*, defenses different from those involved in *Mullins*, in factual circumstances other than those present in *Mullins*.

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BRIEF *AMICUS CURIAE* OF THE TRUSTEES OF BOSTON UNIVERSITY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Trustees of Boston University ("Boston University" or "the University") respectfully support the petition of Kaiser Steel Corporation for a writ of certiorari to the Court of Appeals for the District of Columbia Circuit to review the

decision of that court in *Mullins* v. *Kaiser Steel Corporation*, No. 79-1463 (D.C. Cir. Sept. 17, 1980).

Interest of *Amicus Curiae*

Boston University, which was chartered in 1869 by a special act of the legislature of the Commonwealth of Massachusetts, is a private, non-profit institution of higher education located in Boston, Massachusetts. Certain employees of the University have recently been organized by District 65, United Automobile, Aerospace and Agricultural Implement Workers of America (the "UAW" or the "Union"), and the University and the UAW are now engaged in litigation regarding a particular provision of their collective bargaining agreement. As is more fully set forth below, the United States District Court for the District of Massachusetts compelled the University to take certain actions while refusing, in reliance on the decision of the Court of Appeals for the District of Columbia Circuit in *Mullins* v. *Kaiser Steel Corporation*, No. 79-1463, to consider the University's claims that the actions being compelled would force the University to violate federal law.[1] The *Mullins* case raises important questions of federal law, as shown by the fact that it has already been extended and applied to litigation involving statutory claims and factual circumstances other than those involved in *Mullins*.

Summary of Argument

The decision in *Mullins* v. *Kaiser Steel Corporation* is one which raises questions significant in the administration of the federal judicial system. Boston University, as *amicus*, seeks to call the attention of this Court to the fact that the importance of the *Mullins* case has already been evidenced by its very

[1] The Orders and Memorandum of Decision of the district court are set forth in the Appendix to this brief. The judgments and orders of the district court have been appealed by the University to the Court of Appeals for the First Circuit. *Trustees of Boston University* v. *District 65, UAW*, No. 81-1208 (1st Cir.).

recent application to litigation, in which the University was a party, involving statutory claims and factual circumstances other than those involved in *Mullins*. As a result, the University has been compelled by a federal court to engage in action that it believes to be illegal, without any opportunity to present and prove that illegality to the court.

Argument

THE DECISION OF THE COURT OF APPEALS IN *Mullins* v. *Kaiser Steel Corporation* RAISES IMPORTANT QUESTIONS OF FEDERAL LAW OF POTENTIALLY WIDESPREAD SIGNIFICANCE, AS ALREADY SHOWN BY ITS APPLICATION TO LITIGATION INVOLVING BOSTON UNIVERSITY.

The United States District Court for the District of Massachusetts has very recently ordered Boston University to make available to its employees a Union-sponsored health benefits plan which the University believes violates federal law. In issuing that order on March 24, 1981, the district court relied on *Mullins* v. *Kaiser Steel Corporation* in stating that it would "decline . . . to consider" the University's allegations that contributions to the plan would violate the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001 *et seq.* In so ruling, the district court read *Mullins* as applying to statutory defenses other than those involved in the *Mullins* case, and also relied on the *Mullins* case in confirming an arbitrator's award which the University had immediately challenged on the ground that it compelled illegal conduct.

The University and the UAW executed their first collective bargaining agreement on October 5, 1979. During the course of negotiations, the UAW proposed that the University offer, in addition to two other health benefits programs, a Union-sponsored plan entitled the "65 Security Plan", which was described in a booklet submitted by the Union to the University during negotiations. The University maintained that the

descriptive booklet was insufficient to ascertain whether the plan complied with state and federal statutes. The University, therefore, before agreeing to offer the Union-sponsored plan, insisted on the execution of a memorandum which provided that the plan would not be offered to employees "until the Union has supplied the complete Health and Welfare contract for review by the University and then formal adoption as an appendix" to the collective bargaining agreement.

The UAW did not proffer a health benefits contract applicable to the University in purportedly final form until February 20, 1980. The plan presented at that time, the "BU 65 Security Plan", differed from the booklet presented to the University during negotiations. The University refused to implement the plan on the ground that it was materially different from the negotiated plan and that it violated federal law. After arbitration proceedings, an arbitrator rendered an award on December 29, 1980, directing the University to implement the plan, in effect finding as a matter of contract interpretation that the University had agreed to accept *any* plan the Union eventually produced as long as the University's contribution to it would remain constant.

At the same time, however, the arbitrator expressly declined to rule on the University's allegations that the plan and the University's contributions to it would be illegal, concluding that the issues could not appropriately be resolved in the arbitral forum.

Therefore, on January 28, 1981, the University filed a Complaint and Motion to Vacate Arbitration Award in the United States District Court for the District of Massachusetts, *Trustees of Boston University* v. *District 65, UAW*, Civil Action No. 81-198-Z. The University did not challenge the arbitrator's award as a matter of contract interpretation, conceding that any errors of contract interpretation would be within the range permitted under *Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597-99 (1960). Rather, the University alleged and offered to prove that the actions required by the arbitrator's award would violate federal law.

On February 5, 1981, the UAW filed an independent action in the same court to confirm and enforce the arbitrator's award, *District 65, UAW* v. *Trustees of Boston University*, Civil Action No. 81-329-Z. The actions were consolidated, and on March 4, 1981, the Union filed a motion for summary judgment in the consolidated actions.

In opposing the Union's motion for summary judgment, the University argued that the arbitrator's award directed the University to take action which would violate three federal statutes.[2] With regard to ERISA, the University submitted evidence gathered during discovery and offered to prove that, at a time when the 65 Security Plan as a whole was operating at an enormous deficit, the Union trustees of the plan[3] advocated the approval of the BU 65 Security Plan, knowing or having reason to know that the BU plan could not be self-

[2] In addition to the ERISA claim, the University asserted that enforcement of the arbitrator's award would violate Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(3), and Section 302 of the Taft-Hartley Act, 29 U.S.C. § 186. The Section 8(a)(3) claim was based on the fact that the Union health benefits plan was by its terms limited to Union members, and that, while the membership of Local 65 of the UAW had belatedly voted to allow non-members to participate in the plan, extension to non-members had not been approved by the trustees of the plan, who alone have the power to make changes in eligibility requirements. The University alleged that the plan violated Section 302 of the Taft-Hartley Act, which sets forth specific requirements for union-sponsored benefit plans, because, *inter alia*, employer trustees were not represented equally with employee trustees, the contribution required of the University by the arbitrator's award was inconsistent with the plan's Declaration of Trust, and the plan was manipulated so as to benefit the Union's institutional interests rather than being maintained for the sole and exclusive benefit of the plan's beneficiaries.

The district court also rejected these claims without resolving the merits of the University's specific allegations, but did not expressly rely on the decision in *Mullins* v. *Kaiser Steel Corporation*. App. A-6 to A-10.

[3] The 65 Security Plan is one purportedly designed to comply with Section 302(c) of the Taft-Hartley Act, 29 U.S.C. § 186(c), which imposes certain specific requirements on health benefit and other trust funds established by unions. Section 302(c), *inter alia*, requires a union-sponsored trust fund to have an equal number of employer and employee trustees, and a method for resolving deadlocks.

supporting and that the benefits it promised would require the diversion of trust assets from the contributions of other employers as well as plan reserves. The University also submitted evidence to prove that the Chairman of the Board of Trustees of the 65 Security Plan (who was also the Union President) withheld from the plan's employer trustees a formal actuarial report disclosing that the University's contributions were not remotely sufficient to fund the benefits promised the University's employees. These actions, the University alleged, violated the fiduciary obligations imposed by Section 404 of ERISA, 29 U.S.C. § 1104. The University also alleged that these actions violated Section 402 of ERISA, 29 U.S.C. § 1102, which requires that every plan be "maintained pursuant to a written instrument", because they were taken in derogation of a prior resolution of the board of Trustees that each benefit package was to be "self-supporting and not subsidized by the rest of the Security Plan." Finally, the University offered to prove that the diversion of trust assets contributed by other employers to subsidize benefits to the University's employees, made necessary by the fact that the benefits promised those employees would exceed the University's contributions, was a manipulation designed and intended to assist the Union in receiving more support and dues-paying members. Such a transfer of assets for the beneficial use of the Union, the University alleged, was not only a breach of fiduciary duty but also a prohibited transaction under Section 406 of ERISA, 29 U.S.C. §1106. The University asserted that it could find itself liable as a participant in a breach of fiduciary duty for contributing to the trust with knowledge that the trustees were violating their fiduciary responsibilities. See *Freund* v. *Marshall & Ilsley Bank*, 485 F.Supp. 629, 641-42 (W.D. Wis. 1979).

In orders and a memorandum of decision dated March 24, 1981, the district court dismissed the University's action and granted summary judgment to the UAW, ordering that the University immediately notify all employees in the bargaining

unit of the availability of the 65 Security Plan and make that plan available to them beginning on April 1, 1981. App. A-2. With respect to the ERISA allegations made by the University, the court stated that it "decline[d] the University's invitation to consider its ERISA defense", expressly relying on the decision of the Court of Appeals in *Mullins* v. *Kaiser Steel Corporation*, and reasoning that

> the statutory scheme of ERISA requires an employer to being its allegations to the Secretary of Labor, who has broad discretionary powers to investigate and enforce the fiduciary standards of the statute. . . .
>
> The University . . . has recourse to an administrative remedy through the Secretary of Labor, whereby its complaints and allegations concerning the management and operation of the 65 Security Plan can be investigated and, if proven, effectively remedied. App. A-11 to A-12.

The district court's decision manifests the importance of the issues involved in the *Mullins* case, and the potential significance of that case in a variety of circumstances other than those presented in *Mullins*. In the University's case, for example, the decision of the district court applied the reasoning of *Mullins* to claims arising under ERISA, statutory defenses not involved in *Mullins*, and remitted the University to "an administrative remedy through the Secretary of Labor, who has broad discretionary powers to investigate and enforce the fiduciary standards of the statute." Unfortunately, however, nothing in ERISA expressly requires the Secretary of Labor to exercise his "discretionary powers" to act on a complaint by an employer, see 29 U.S.C. §§1131, 1132, 1134, and ERISA contains no express provision for judicial review either of the Secretary's failure to act on a complaint or of an erroneous administrative determination by the Secretary that a complaint is without merit. Moreover, the "administrative remedy" relied on by the district court would have been illusory, where the arbitration award giving rise to the con-

troversy was issued on December 29, 1980, and the University was compelled by the court to take action only three months later, on April 1, 1981.[4]

Thus the University has at this time been compelled by a court relying on the *Mullins* case to implement a plan which it believes is unlawful, while being denied by that same court the right to a determination whether its belief is well founded or whether by implementing the plan it will be contributing to a violation of federal law. Not only is the decision in *Mullins* contrary to the decisions of other circuits, which require a federal court to resolve legal issues on their merits,[5] but also it is contrary to the University's perceptions of its rights and obligations. This is not a case where a party to a contract has seen its claims of illegality tried and been assured that there is no illegality. Rather, the University has been told by a court that, even if the BU 65 Security Plan is illegal, it must nonetheless offer the plan and contribute to it. A major institution of higher learning is continually subject to public scrutiny, must depend on public good will for its financial health, and bears an institutional obligation to advance the public welfare through the encouragement of ethical discourse

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[4] For the "administrative remedy" to mean anything, the Secretary of Labor would apparently have been required to have received the University's complaint; to have initiated and conducted an investigation of that complaint, which could have included making a preliminary determination of "reasonable cause" before proceeding with the investigation, inspecting books and records, and questioning individuals, see 29 U.S.C. §1134(a)(2); to have determined whether either civil or criminal action was appropriate and, if so, to have filed either a criminal, *id.*, §1131, or civil, *id.* §§1109, 1132(a)(2), (5), and (6), action; and to have concluded that civil or criminal action successfully, obtaining either an injunction or other relief enforcing the provisions of ERISA, *id.*, all in three months.

[5] *See, e.g., Perma-Line Corp. of America* v. *Sign Pictorial and Display Union Local 230*, 639 F.2d 890 (2d Cir. 1981); *Frito-Lay, Inc.* v. *Retail Clerks Local 7*, 629 F.2d 653 (10th Cir. 1980); *Warehousemen Local 767* v. *Standard Brands, Inc.*, 579 F.2d 1282, 1291-93 (5th Cir. 1978), *cert. dismissed*, 441 U.S. 957, 443 U.S. 913 (1979); *United Optical Workers Union Local 408* v. *Sterling Optical Co.*, 500 F.2d 220 (2d Cir. 1974); *Local 1898, IAM* v. *Brake & Elec. Sales Corp.*, 279 F.2d 590 (1st Cir. 1960). *Cf. Hurd* v. *Hodge*, 334 U.S. 24, 34-35 (1948).

and conduct. The University, such an institution, is understandably reluctant to accept the conclusion that the rule set forth in *Mullins*, compelling it to take action while precluding consideration of its claims of illegality, is the law of the land.

Conclusion

For the reasons set forth above, Boston University respectfully urges that the petition of Kaiser Steel Corporation for a writ of certiorari to the Court of Appeals for the District of Columbia Circuit be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 81-198-Z
TRUSTEES OF BOSTON UNIVERSITY
v.
DISTRICT 65,
UNITED AUTOMOBILE WORKERS

ORDER

ZOBEL, *D.J.*

In accordance with the Memorandum of Decision dated March 24, 1981, it is

ORDERED that the action by the Trustees of Boston University to vacate the arbitrator's award issued December 29, 1980 be and hereby is dismissed.

March 24, 1981 — RYA W. ZOBEL

DATE — DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 81-329-Z
DISTRICT 65,
UNITED AUTOMOBILE WORKERS
v.
TRUSTEES OF BOSTON UNIVERSITY

ORDER

ZOBEL, *D.J.*

In accordance with the Memorandum of Decision dated March 24, 1981, it is

ORDERED that the arbitrator's award be and hereby is confirmed;

AND IT IS FURTHER ORDERED that the University shall make the 65 Security Plan available forthwith.

AND IT IS FURTHER ORDERED that the University shall forthwith notify all employees in the Local 65 bargaining unit of the immediate availability of the 65 Security Plan. Such notice shall be given before the commencement, on April 1, 1981, of the annual open enrollment period for health plans, and shall offer the 65 Security Plan as one of the health plan options available during that open enrollment period.

March 24, 1981 — RYA W. ZOBEL
DATE — DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 81-198-Z
TRUSTEES OF BOSTON UNIVERSITY
v.
DISTRICT 65,
UNITED AUTOMOBILE WORKERS

• • •

Civil Action No. 81-329-Z
DISTRICT 65,
UNITED AUTOMOBILE WORKERS
v.
TRUSTEES OF BOSTON UNIVERSITY

MEMORANDUM OF DECISION

ZOBEL, *D.J.*

These cases, which have been consolidated, arise from an arbitration award that ordered the Trustees of Boston University (the "University") pursuant to the collective bargaining agreement between the University and District 65, United Automobile Workers (the "Union") to make contributions to the "65 Security Plan", a health benefits plan (the "Fund"), and to make the proposed Boston University Plan (the "Plan") available to eligible employees. The University sues under Sections 301 and 302 of the Labor Management Relations Act, 29 U.S.C. §§185 and 186 ("LMRA") and under Sections 10 and 12 of the United States Arbitration Act, 9 U.S.C. §§10 and 12, to vacate the arbitration award and to enjoin the Union from demanding and collecting any contributions from the University to the Fund on the ground that these contributions would be illegal because the Plan violates Section 302 of the LMRA and various provisions of the Employees Retirement Income Security Act, 29 U.S.C. §1001 *et seq.* ("ERISA"). The Union responded with its action under Section 301 to confirm and enforce the award. Since the University in defense relies on the

same alleged violations of Section 302 of LMRA and ERISA as form the basis of its suit, the issues in both cases are identical and the cases are properly consolidated and considered together.

The matter is before me on the Union's motion for summary judgment. The uncontested factual and procedural background can be summarized briefly. On October 5, 1979 the Union and the University entered into a collective bargaining agreement which was made effective as of September 6, 1979 and which expires June 30, 1981 (the "Agreement"). Article XXXVI of that Agreement provides that the University shall offer, in addition to Blue Cross/Blue Shield Master Medical and Harvard Community Health Plan, the option for employees to be covered by the 65 Security Plan.[1] The Agreement sets the University's contributions at a stated percentage of the Blue Cross/Blue Shield premium, but provides that such a program would not be effective until a detailed plan had been submitted and adopted by the University. On February 20, 1980 the Union submitted a brochure detailing the proposed benefits plan. The University refused to adopt the Plan, on the ground that the proposed program provided benefits different from those to which it had agreed in the Agreement.

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[1] Article XXXVI of the Agreement provides in full:

Health Insurance

The University will continue to offer coverage under Blue Cross/Blue Shield Master Medical, the Harvard Community Health Plan, and the 65 Security Plan, and will maintain this coverage for the term of the contract. Employees covered by this Agreement may elect to be covered by only one (1) such plan. Cost of these plans will be apportioned in the following manner:

> Effective October 1, 1979, the employer's contribution to any plan selected from the choices offered above shall be the dollar amount equal to fifty-eight (58) percent of the prevailing Blue Cross/Blue Shield Master Medical premium. Effective July 1, 1980, the employer's contribution shall be the dollar amount equal to sixty (60) percent of the prevailing Blue Cross/Blue Shield Master Medical premium.
>
> Election of a plan must be made upon initial employment or at such time as an open enrollment period is made available by the University.

On March 26, 1980 the Union filed a grievance and on April 8, 1980, it submitted the grievance to arbitration in accordance with Article XIV of the Agreement. The arbitrator held hearings on June 13, July 28, August 8 and September 22 and 29, 1980. The parties offered testimonial and documentary evidence, including testimony of actuaries; and both submitted briefs. On December 29, 1980 the arbitrator issued an award as follows:

> The University violated Article XXXVI of the collective bargaining agreement by failing to offer coverage under the 65 Security Plan during the open enrollment period from April 1 to April 30, 1980. The University should make the 65 Security Plan available forthwith, with an open enrollment period as soon as is practically possible. Employees who have been denied coverage by the 65 Security Plan should be made whole.

In the body of his decision, the arbitrator, while noting that a detailed judgment as to the actuarial soundness of the Plan was not necessary, found that "the assets of the fund appear to be more than adequate to provide the benefits specified in the plan, even if a shortfall should occur. The fact that the Fund has been in existence since 1945 and has paid out over $150 million in claims is an impressive statistic." In addition, the arbitrator found that "the membership voted to make all employees in the bargaining unit eligible to participate in the 65 Security Plan."

On about December 31, 1980, the Union requested the University to comply with the arbitrator's award, but the latter on January 28, 1981 filed this action to vacate the award in this Court. On February 5, 1981 the Union filed its complaint to confirm the award and for a preliminary injunction. Because the Union had not demonstrated irreparable harm if preliminary relief were not granted, the Court on March 3, 1981 denied the preliminary injunction but ordered expedited discovery and scheduled these cases for trial on March 16, 1981.

On April 1, 1981 the University's annual "open-enrollment" period begins, during which University employees may designate health plans for the coming year.[2] On May 1, 1981 negotiations are scheduled to begin between the Union and the University for a new collective bargaining agreement. The current Agreement, including the article which requires that the 65 Security Plan be made available, expires on June 30, 1981.

The issues in these cases have been substantially narrowed after a pretrial conference by the pretrial order of March 20, 1981. The order accepted as conclusive the arbitrator's findings, after hearing evidence from both parties, that the Boston University Plan is actuarially adequate and that the resources of the Fund are sufficient. Accordingly, acceptance of the Plan by the trustees of the Fund does not on either ground constitute a breach of their fiduciary responsibility.

In light of the pretrial order, two categories of issues remain in the case and as to them the facts are not in dispute. The first concerns the alleged violations of section 302; the second, the alleged violations of ERISA.

This Court's jurisdiction to restrain violations of section 302 is, in light of the Federal scheme of labor statutes, quite narrow. The Court may restrain only "violations of basic structure, as determined by Congress, not violations of fiduciary obligations or standards of prudence in the administration of the trust funds." *Bowers* v. *Ulpiano Casal, Inc.*, 393 F.2d 421, 424 (1st Cir. 1968). The Supreme Court examined the purpose and legislative history of section 302 in *Arroyo* v. *United States*, 359 U.S. 419 (1959) and concluded that the Congressional concern behind the section was "with corruption of collective bargaining through bribery of employee representatives by employers, with extortion by employee representatives, and with the possible abuse by union officers of the power which they might achieve if welfare funds were left to

[2] The University within the last two weeks sent letters to all employees in the bargaining unit announcing the "open-enrollment" period and describing two options — Blue Cross/Blue Shield Master Medical and Harvard community Health Plan. The "65 Security Plan" is not mentioned in the letter.

their sole control." 359 U.S. at 425-426. The types of violations identified by the First Circuit in *Ulpiano Casal* as structural respond to this concern to prevent corruption and overreaching by union officials, and in that context include, among others, "contributions to a trust fund which was not established for the sole and exclusive benefit of employees and dependents; . . . which did not set forth in writing the detailed basis of payments, which did not have equal representation of employees and employers with provision for a neutral person or umpire." 393 F.2d at 424, n.4. This jurisdictional limit on the court's power to enjoin violations sets an "admittedly . . . severe standard" but one which "was compelled by legislative history and followed by a majority of cases." *Bowers* v. *Moreno*, 520 F.2d 843, 846 (1st Cir. 1975). The initial task, therefore, is to analyze each of the University's claims and defenses to determine whether the allegations are sufficient to constitute structural violations or whether they concern merely "day to day fiduciary administration of welfare and pension funds" over which the Court has no jurisdiction. *Turner* v. *Loc. U. No. 302, Inter. Broth. of Team.*, 604 F.2d 1219, 1227 (9th Cir. 1979).

The University first alleges that because the payments which it is required to make under the arbitrator's award, are based on a percentage of the Blue Cross/Blue Shield premium rather than on a percentage of payroll, they are different in kind from the payments made by all other employers who contribute to the Fund, and therefore violate the "similar payments" requirement of section 302(c)(5). Even if the University's proposed payments are to be calculated on a basis different from those of other employers, such a difference of payment method cannot and does not constitute a violation of the structure of the 65 Security Plan as a whole.

Second, the University alleges that its payments to the Fund will be insufficient to pay for the proposed benefits to covered employees. As a result, contributions made by other employers will necessarily be drawn upon to provide benefits to University employees, in violation of the requirement in section 302

(c)(5) that all employer payments be made "for the sole and exclusive benefit of the employees of such employer." While a violation of the "sole and exclusive benefit" requirement may constitute a structural violation, analysis of the University's factual allegations in light of the relevant law demonstrates that, even if accepted as true they would not operate to violate the exclusive benefit requirement.

It has consistently been held that the "sole and exclusive benefit" clause does not "require that each employee's benefit be "traced" to the value of the payments by that employee's employer." *Crawford* v. *Cianciulli*, 357 F.Supp. 357, 372 (E.D.Pa. 1973); *Kreindler* v. *Clarise Sportswear Co., Inc.*, 184 F.Supp. 182 (S.D.N.Y. 1960). The very nature of a multi-employer fund involves the mingling of employer contributions to create a pool out of which particular employees receive benefits; risks are shared, at least to some extent, among all employers. In *Crawford*, *supra*, the court considered whether the exclusive benefits requirement was violated by payments from a multi-employer fund to employees of employers who had ceased making contributions to the fund and whose past contributions had been exhausted. Although such payments were necessarily funded by contributions from other employers because the recipients' employer's contributions had all been disbursed, the Court found no violation:

> Congress was not concerned with the possible risks of "unfunded liabilities" incurred by an employer who contributed to a multi-employer established trust fund. Nor was it concerned with how the payments contributed to a multi-employer fund were administered among the employees of employers contributing so long as payments made by any particular employer were not used to the exclusion of such employer's employees. 357 F.Supp. at 372.

In the present case, there is no allegation that employees of the University, or of any other employer, will be excluded from receiving benefit payments. On the contrary, the allegations merely assert that benefits to University employees will be funded to some unknown extent by contributions paid into

the fund by other employers. This is precisely what was held by the *Crawford* court to be consistent with section 302. In a somewhat similar case the Supreme Court recently considered whether an employer may, in light of section 302, make benefit contributions measured not only by the hours worked by his own employees who were fund beneficiaries, but measured as well by the hours worked by the non-beneficiary employees of a sub-contractor. The Court found no violation either of the letter or the spirit of section 302, because the challenged scheme did no disservice to the Congressional purpose of section 302 to combat corruption, bribery, extortion and abuse of power by union officers. *Walsh* v. *Schlecht*, 429 U.S. 401, 410-411 (1977).

Similarly here, the Plan as proposed does not run afoul of the Congressional purpose in enacting section 302. The mere fact that contributions from other employers may fund benefits to University employees is, in light of that Congressional purpose, not enough to make out a violation of the exclusive benefits requirement of 302(c)(5).

The third allegation of impropriety under section 302 is that the union trustees of the Fund violated their fiduciary duties by allegedly providing incomplete or misleading information to employer trustees with respect to the Plan, and by generally dominating the employer trustees. Such alleged fiduciary violations were explicitly removed from the ambit of the Court's jurisdiction by the two *Bowers* cases. Although a fiduciary violation, such as alleged abuse of trust funds might potentially become structural if it conflicted with the purposes behind section 302, the allegations here relate to the methods by which trustees went about their business and are clearly operational rather than structural.

The University also alleges that there was unequal employer/Union representation because at the meeting at which the trustees of the Fund voted to adopt the B.U. Plan there was a vacancy among employer trustees. Here again,

Ulpiano Casal identified as a potential structural violation a plan "which did not have equal representation of employees and employers with provision for a neutral person or umpire," 393 F.2d at 424, n.4. The University has not alleged that the trust agreement of the Fund provides for an unequal number of employer and employee trustees. Nor does it allege, as was the case in *Nedd* v. *United Mine Workers of Am.*, 556 F.2d 190 (9th Cir. 1977), that an imbalance in trustees existed for many years and during a time that a fund permitted employer contributions to become dangerously delinquent. On the contrary, the most that can be said here is that the employer trustees themselves delayed for over a year in replacing one of their number who had resigned. It would be an inappropriate application of *Ulpiano Casal* to hold that such temporary indecision and inaction by employer representatives constitutes a structural violation of the fund as a whole which would render illegal employer contributions to the Fund.

The University next asserts that the vote of the Fund's trustees in August 1980 accepted a plan limited to union members. The assertion is foreclosed by the findings of the arbitrator and is insufficient in law. The arbitrator found that the membership voted in June 1980 to offer the Plan to all employees in the bargaining unit, and he found the all inclusive Plan to be actuarially adequate. Thus the trustees did not breach any fiduciary obligation and their action is, at best, an operational matter. Finally, the university claims the absence of a written agreement specifying the detailed basis of payments to the Plan; if true, this would be a "structural" violation, *Bowers* v. *Ulpiano Casal*. However, a collective bargaining agreement with the contributing employer, which sets forth the basis on which payments are to be made satisfies the statutory requirement. *Moglia* v. *Geoghegan*, 403 F.2d 110 (2d Cir. 1968). The Agreement between the University and the Union in this case does specify in detail payments to be made. As a matter of law, this Agreement meets the 302(c)(5) requirement for a "written agreement", and there is no violation.

The University also relies on various alleged violations of ERISA. The enforcement provision of ERISA, 29 U.S.C. §1132, provides that civil actions may be brought only by a participant, beneficiary, or fiduciary of a fund, or by the Secretary of Labor. An employer who contributes to employee benefit plans does not fit into any of these categories. *Wong* v. *Bacon*, 445 F.Supp. 1177, 1183 (N.D.Cal. 1977). Instead, the statutory scheme of ERISA requires an employer to bring its allegations to the Secretary of Labor, who has broad discretionary powers to investigate and enforce the fiduciary standards of the statute. The Congressional intent in establishing ERISA was to allocate to the employer an administrative remedy only, thus protecting the courts and plan beneficiaries from employers' use of ERISA to obstruct actions for contractually agreed-upon contributions. In this respect the ERISA defense is analogous to an unfair labor practice defense which is precluded in favor of the employer's administrative remedies. *Mullins* v. *Kaiser Steel Corp.*, ____ F.2d ____, No. 79-1463 (D.C. Cir. 1980) In that case, an action for contributions to a welfare fund, the court refused to entertain a defense, based on an alleged violation of the "hot cargo" provisions of the NLRA. The Court considered the proposed defense in enough detail to ascertain that an administrative remedy through the NLRB was available, and held the employer to that remedy.[3]

[3] Congressional intent to ensure that welfare fund beneficiaries be able to compel, without undue hindrance and expense, contractually required contributions to funds, is further underlined by recent remarks of Congressman Frank Thompson, Chairman of the House Labor Management Relations Subcommittee in connection with recent amendments to ERISA. After delineating the problems created by employers who are unwilling to make their promised contributions, the Congressman went on to endorse cases holding that events such as trustee misconduct and labor strikes do not abrogate an employer's duty to contribute, and he concluded that "Federal pension law should permit trustees of plans to recover delinquent contributions efficaciously, and without regard to issues which might arise under labor-management relations law — other than 29 U.S.C. §186. Sound national pension policy demands that employers who enter into agreements providing for pension contributions not be permitted to repudiate their pension promises." Cong.Rec. (1980) No. 14, 4.7899 (Aug. 26, 1970).

> "an employer could effectively circumvent the authority of the Board simply by doing what Kaiser suggests: freely ignore an agreement it signed and then defend in an action to enforce it on the ground that it violated section 8(e) and should not be enforced. To allow that result would undermine the enforcement scheme Congress endeavored to devise and would be inconsistent with the principle of primary jurisdiction that has so long been a part of federal labor law. (slip op. at p. 26)

The University also has recourse to an administrative remedy through the Secretary of Labor, whereby its complaints and allegations concerning the management and operation of the 65 Security Plan can be investigated and, if proven, effectively remedied. For this Court to become involved in a detailed examination of various alleged breaches of fiduciary duty by Fund trustees would not only frustrate the Union's ability to obtain simple and straightforward relief through enforcement of the arbitrator's award, but would also counter the careful statutory scheme. I therefore decline the University's invitation to consider its ERISA defense.

For the reasons stated, the Union's motion for summary judgment is allowed. Judgment may be entered in Civil Action No. 81-198 dismissing the complaint. In Civil Action No. 81-329 judgment may enter confirming the arbitrator's award and ordering the University to comply therewith.

March 24, 1981 — RYA W. ZOBEL

DATE — DISTRICT JUDGE